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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 429

SEAWAY BEVERAGES, INC.,
Petitioner,

vs.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY OF THE UNITED STATES, DWIGHT E. AVIS, DIRECTOR OF ALCOHOL AND TOBACCO TAX DIVISION OF INTERNAL REVENUE SERVICE, AND THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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THE GUTHROP-WARREN PRINTING COMPANY, CHICAGO

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Seaway Beverages, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above case on April 11, 1963, petition for rehearing having been denied on June 3, 1963.

OPINIONS BELOW.

The opinion of the Director of the Alcohol and Tobacco Tax Division of the Internal Revenue Service is unreported. The opinion of the Court of Appeals is printed in the Appendix hereto, *infra*, page 34.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 11, 1963 (Appendix, *infra*, page 40). Rehearing was denied on June 3, 1963 (Appendix, *infra*, page 41). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

I.

Does the denial of basic permits in this case

(a) violate a person's (the sole shareholder of the corporate petitioner) right under the Fifth Amendment to earn a livelihood in the only business occupation in which he has engaged during his adult life, particularly when the only ground for such denial is "guilt" by association, and does not such ground in itself

(b) violate a person's right to freedom of association under the First Amendment and are not these constitutional violations conspicuously flagrant when the record conclusively demonstrated that:

(1) The association at issue was not voluntary but was compelled by the board of directors of his former corporate employer and his only alternative to compliance was the loss of employment;

and where the findings of fact by the administrative agency conclusively established that:

(2) Evidence showed that the person has a good general reputation as attested by some fifteen witnesses and no contrary evidence was introduced;

(3) Several witnesses testified without contradiction that they were familiar with the permit system of the liquor industry and that in their opinion the

person would act in conformity with the Federal laws and that he is a decent law abiding citizen;

(4) The person has never been arrested or convicted of any crimes of any kind, nature or description;

(5) The person conducted himself without fault while holding several permits in his own name;

(6) The person testified that he would not hire any person of ill repute, even if it were to his economic advantage to do so;

(7) The person testified that he is not and has never been a member of any syndicate or ring of hoodlums, that he is not a front for any such syndicate or ring or any other person and that no person other than those set out in the application would have any interest in the business for which he seeks a permit and no contrary evidence was adduced;

(8) No evidence was adduced that any person of ill repute is a shareholder, officer, director, employee or agent, of, or associated or connected in any way with the petitioner;

(9) There was no evidence that the person had ever done business with the "tainted" associate prior to being forced into such association by virtue of the fact that both he and the "tainted" associate were employed by a common corporate employer;

(10) There was no evidence that the person had employed the "tainted" associate or other persons of ill repute, or had trade or other connections with such persons since he left the employment of his former corporate employer;

(11) Nor was there evidence that the "tainted" associate was connected with the petitioner in this case or that that company is a subterfuge or front for such individual to obtain a permit.

II.

Does a statutory authorization to deny basic permits if a "person is by reason of his business experience . . . or trade connections, not likely . . . to maintain operations in conformity with Federal law," as applied in this case, violate the precepts of separation of powers under the constitution by purporting to delegate legislative powers to an administrative agency without sufficient guides or standards, thus endowing the agency with unlimited and unbridled control over whom may enter the liquor industry and allowing the agency to deny permits on the basis of speculation and arbitrary caprice?

III.

Does the denial of a person's right to pursue his occupation on the basis of inflammatory hearsay evidence not subject to cross-examination and which was introduced solely for the purpose of prejudicing the person's rights and denying to him a fair and impartial hearing violate the Fifth Amendment, particularly when the resultant prejudice is demonstrated on the face of the opinion of the Court of Appeals?

IV.

May basic permits be denied under the Fifth Amendment when the order of denial is not supported by the findings or by the evidence?

STATUTE INVOLVED.

The statutory provision involved is Section 4(a) (2) (B) of the Federal Alcohol Administration Act, cited as section 204(a) (2) (B) of title 27 of the United States Code, 27 U. S. C. § 204(a) (2) (B), 49 Stat. 977 *et seq.*, as amended.

STATEMENT

The petitioner, Seaway Beverages, Inc., filed applications dated August 31, 1959, for basic permits as importer and wholesaler of malt beverages (JA 1-38) under the provisions of the Federal Alcohol Administration Act (49 Stat. 977 *et seq.*, as amended, U. S. C. A., Title 27, §201 *et seq.*, hereinafter referred to as the Act). The petitioner had purchased the assets of Premium Beer Sales, Inc. which held basic permits issued under such statutes and has continued business operations pending final action on the current applications (JA 467).

On December 6, 1960, Notices of Contemplated Disapproval of these applications were served upon the petitioner (JA 39-42), citing as grounds certain matters concerning the past business experience and trade connections of Dominic Volpe, president, treasurer, director and sole stockholder of the petitioner (JA 40, 42).

On July 28, 1961, the hearing examiner, after a hearing, submitted his recommendation that the applications be disapproved and the requested permits be denied (JA 420-455).

By an order dated September 5, 1961, the Assistant Regional Commissioner, Alcohol and Tobacco Tax, Chicago Region of the Internal Revenue Service, denied, after hearing, the applications of the petitioner, Seaway Beverages, Inc., for basic permits to engage in business as a wholesaler of malt beverage and as an importer of malt beverage under the Federal Alcohol Administration Act and substantially adopted the findings and conclusions set forth in the recommended decision of the hearing examiner (JA 467-481).

A petition for appeal was timely filed with the Director of the Alcohol and Tobacco Tax Division (JA 482-487),

who entered his order dated March 27, 1962, (1) modifying the Assistant Regional Commissioner's decision denying the applications for permits and (2) affirmed the decision of the Assistant Regional Commissioner as modified (JA 487-497).

On April 11, 1963, the United States Court of Appeals for the District of Columbia Circuit affirmed the order denying petitioner's applications for basic permits.

Premium Beer Sales, Inc. (hereafter called "Premium"), was incorporated in 1944 (JA 162, 170) and operated continuously in the beer distributing business until August 10, 1959 (JA 281-2, 314). Henry Morgen was the sole shareholder of Premium for the time of its incorporation until Morgen's death on March 3, 1959 (JA 162, 166, 181, 282, 314). The directors of Premium from 1944 to 1959 were Henry Morgen; Anna Morgen, his wife; and Howard Rice (JA 167-8). The officers of Premium from 1944 to 1956 were Henry Morgen, president, and Anna Morgen, his wife, secretary. Either Henry Morgen or his wife was also the treasurer (JA 98, 170).

Dominic Volpe (hereafter called "Volpe") was employed by Premium from 1953 to August 10, 1959 (JA 76, 282, 317, 319). On May 1, 1956, Volpe was given the title of president of Premium by Morgen (JA 170, 174, 449).

Premium was a distributor for Fox Head Brewing Company of Waukesha, Wisconsin (J.A. 82). Fox Head and Premium had an arrangement whereby Premium was to employ 4 salesmen in the Chicago area and Fox Head was to pay their salaries and expenses (J.A. 82).

The government introduced a form of contract dated May 1, 1956, between Premium and one Anthony J. Accardo whereby Accardo was employed by Premium to sell beer at a salary of $1,250 per week plus a bonus on certain sales, for the period from April 9, 1956 to October

31, 1960 (Government Exhibit 1; JA 52-4, 346-8). The contract was signed by Accardo and by Volpe as president and Howard Rice as assistant secretary of Premium (JA 52-3).

In regard to Volpe's signing of the document the uncontradicted testimony was that Morgen called Volpe in his office and told Volpe that he was making him the president of Premium (JA 308); then Morgen handed Volpe a paper and told him to sign it without giving Volpe an opportunity to read it; Morgen then asked Rice to sign it and rebuked Rice for attempting to read the paper; Rice signed it and put the corporate seal on it (JA 309); a few days later, Volpe learned that what he had signed was the document between Accardo and Premium (JA 312).

The hearing examiner found that "the negotiations leading up to his employment [of Accardo by Premium] were initiated by Feicht" (AJ 451), meaning Arthur Feicht, the president and chairman of Fox Head Brewery, who appeared as a government witness (JA 82). Feicht testified that when Fox Head Brewing Company turned down Feicht's proposal to employ Accardo, Henry Morgen, who had been involved in the negotiations said that this could be a very profitable arrangement, that "we were interested in selling beer" and that "let me handle this, you pay me the $5,000 a month and let me negotiate" (JA 93).

In *United States* v. *Accardo*, 298 F. 2d 133 (1962), the Court of Appeals for the Seventh Circuit, in discussing the same document between Accardo and Premium, said:

> "The Government introduced the following evidence: Although defendant [Accardo] had an employment contract with Premium, the latter was reimbursed by Fox Head Brewery for the contract payments to defendant."

In the present case the evidence introduced was that a few days after Volpe had signed the document Morgen told Volpe that Accardo was going to work, that the brewery was going to pay Morgen and Morgen was going to pay Accardo (JA 312-313).

The government introduced the testimony of Joseph Morris, deputy superintendent of police of Chicago, and of Virgil W. Peterson, operating director of the Chicago Crime Commission, who testified as to Accardo's reputation (JA 54-68). The government also introduced, as exhibits, Accardo's conviction on income tax charges (Ex. 3; JA 131-2), which was subsequently reversed on appeal (*United States* v. *Accardo*, 298 F. 2d 133 (7th Cir., 1962)) and Accardo was subsequently acquitted of income tax charges; a series of newspaper clippings referring to Accardo (Exs. 4 and 5; JA 135-142, 150, 349-387); and Accardo's federal income tax returns for the years 1940 through 1958 (Exs. 6 and 7; JA 144-7; 388-393). None of these exhibits referred in any way to Volpe or to anyone connected in any way with the petitioner herein.

Henry Morgen completely controlled and dominated Premium, before and after Volpe was named president, until Morgen's death on March 3, 1959. Throughout his employment by Premium from 1953 until Premium went out of business on August 10, 1959, Volpe was merely an employee of Premium, under the complete control, domination and supervision of Morgen until March 3, 1959, and under the supervision of Premium director, and general office manager, Howard Rice, until August 10, 1959.

Government witness Arthur J. Feicht, who had been the president and chairman of the board of directors of Fox Head Brewing Company (JA 82), testified that Morgen "ran the show" for Premium and was without a doubt the boss (JA 96) and that Volpe worked for Morgen and was under Morgen's direction and control (JA 97).

Government witness Frank Huber, who had been president of Fox Head (JA 113) testified that "I know Mr. Volpe had to contact Mr. Morgen about everything almost, anyway" (JA 117).

Howard Rice was the general office manager of Premium (JA 179) and was the comptroller of one of Morgen's other companies, Morgen, Inc. (JA 256). Rice was Morgen's "right-hand man for all matters of business" (JA 256). Feicht testified that in regard to financial matters "I think Mr. Rice ran that show pretty well, he was the cashier and he paid the bills" (JA 110). All questions which Feicht had about money matters were taken up with Morgen and Rice (JA 111).

Morgen, Inc., the company which operated Morgen's Schlitz Beer Distributorship, was headquartered at 315 West Chicago Avenue in Chicago (JA 180), whereas Premium, the company which operated the Fox Head and Fox DeLuxe Beer distributorships was headquartered at 2555 West Armitage Avenue in Chicago (JA 164). Feicht testified that when he wished to discuss the financial relations between the Fox Head Brewing Company and Premium, he went to Morgen's office on Chicago Avenue and not to the Premium office on Armitage Avenue (JA 111).

Curtis Catron testified that he was a certified public accountant (JA 159), that he was the auditor for Premium since its incorporation in 1944 (JA 160), that he was called upon by Morgen to consider management problems of Premium (JA 160-1), that discussions relating to Premium were held at Morgen's Chicago Avenue office two or three times a month (JA 162, 180) from 1944 to 1959 (JA 162), that Morgen set the policy for Premium and made executive decisions, whereas Volpe did not (JA 163), that Catron discussed all executive and financial problems with Morgen

and that Volpe did not participate (JA 172, 182), that "Morgen had full charge of all employment," whereas Volpe had no right to hire or fire (JA 173, 183), that Morgen made all arrangements for the rental of trucks by Premium and that trucks were rented from City Truck Leasing Company, a company owned by the Morgen family (JA 177-8), that payment of money by Premium required Morgen's approval and signature and that Volpe had nothing to do with Premium payments (JA 179), that all of the books and records of Premium were kept at the Chicago Avenue office (JA 179); that Morgen's control continued without change after Volpe became president of Premium (JA 173-4); and that Morgen had hired Volpe and Volpe carried out Morgen's orders (JA 183).

Records in Catron's office showed that Premium's audit reports were ordered "Mail to Henry Morgen personally, Morgen, Inc., 315 West Chicago Avenue" (Applicant's Exhibit 3; JA 164-5, 396).

Charles M. Davis testified that he was the divisional representative for the Goetz Division of the Pearl Brewing Company (JA 184), that "I knew Henry Morgen • • • was in charge of Premium" (JA 184), and that "all my discussions regarding any promotion, any hiring or anything of a promotional nature which contributed to our sales, both for the cause of Premium or for the cause of Goetz Brewing Company had to be discussed with • • • Morgen" (JA 184).

Lawrence M. Cohen testified that he was in the advertising business with Schram Advertising (JA 185) and that all his discussions relating to Premium's advertising were had with Morgen at Chicago Avenue or at the Fox Head brewery at Waukesha, Wisconsin whereas he had no discussions relating to Premium's advertising with Volpe (JA 186).

Morris Kozak testified that he was the president of Advanced Neon Signs Corporation (JA 213), which furnished and installed signs for Premium and that he dealt exclusively with Morgen and Morgen made all decisions and that he continued to deal with Morgen after Volpe became president of Premium (JA 214).

Donald Baum testified that he was an insurance broker and agent, that he wrote all of Premium's Insurance business from its incorporation to Morgen's death (JA 254-5), that Morgen was the owner of Premium (JA 256); that all discussions relative to insurance were had with Morgen or Rice at 315 West Chicago Avenue (JA 255) and that Volpe made no insurance decisions for Premium before or after he became president in 1956 (JA 255, 257, 258).

Daniel Jaman testified that he was employed by Morgen for Premium from 1949 or 1950 to 1953 as general manager (JA 187-8), that Morgen owned and controlled Premium (JA 187), that Morgen gave the orders, "he set the policies and we followed them the best we could" (JA 188), that when Jaman was manager, "I never had the occasion to be able to hire or fire, it always came from Mr. Morgen" who had the exclusive power to hire and fire (JA 188-9, 192).

Martin Brin testified that he was a beer salesman for Premium, that Morgan employed Brin (JA 210), that he was employed by Premium from 1954 to 1959; that sales meetings and meetings for Premium salesmen were held at Morgen's, Inc., on Chicago Avenue with Morgen presiding (JA 210-211), that Morgen presided after Volpe became president (JA 211), that Morgen set Brin's salary and Brin asked Morgen for a raise (JA 211), that Morgen issued orders and often countermanded Volpe's orders (JA 211), and that Morgen told Brin that Morgen was boss and not to listen to Volpe (JA 212).

Henry A. Lazewski testified that he was a driver-salesman for Premium since 1948, that he was hired by Morgen (JA 219-220), that he asked for raises from Morgen rather than Volpe even after Volpe became president, that "everything came from Chicago Avenue, Mr. Henry Morgen" (JA 220), that sales meetings of driver-salesmen took place at Chicago Avenue and were conducted by Morgen (JA 221), that Morgen gave the orders (JA 221), that Morgen ran contests and gave bonuses whereas Volpe handled no sales meetings (JA 222).

Several other employees of Premium—Pat Gienteile, Walter Gunkler (JA 224-5), Henry Friedman, Hy Tucker and John Spence (JA 225-6)—testified or it was stipulated that they would testify that Morgen owned Premium, that Morgen did the hiring and firing at Premium, that driver-salesmen meetings were held at Chicago Avenue with Morgen as chairman, that Morgen gave the orders and set the policies, that when an employee wanted to borrow money, he went to Morgen (JA 224), and that all of this was true before and after the time when Volpe became president (JA 226), and that Friedman, Tucker and Spence are all presently employed in other occupations (JA 226).

Dominic Volpe testified that all major meetings of Premium personnel were held at Chicago Avenue with Henry Morgen in charge and giving all instructions (JA 310, 328), and this was true before and after Morgen told Volpe that he was the president (JA 310); that Volpe did not order the beer for Premium, did not handle the inventory, did not have the authority to hire or fire, did not have anything to do with the monies of Premium or to sign anything in connection with the monies except payroll checks after 1956, did not have possession of the books and records nor ever look into them, nor did Volpe ever have access to any of the financial or auditing statements of Premium (JA 311) and that after Morgen's death on

March 3, 1959 and until Premium went out of business on August 10, 1959, Volpe answered to Howard Rice in the operation of Premium (JA 314).

Correspondence from Premium's files showed that after Volpe was president, Morgen continued to operate and control Premium (Applicant's Exhibits 4-19; JA 175-7, 396-414).

Volpe never owned any stock in Premium Beer Sales, Inc. (JA 166-7, 310) and he was never a director of Premium and was never present at a director's meeting (JA 168, 310).

Volpe caused to be organized on July 25, 1959, a corporation known as Seaway Beverages, Inc., the petitioner herein, all of the stock in which is owned by Volpe (JA 314, 323). The officers are Volpe, his wife and attorney A. Bradley Eben (JA 314).

Dominic Volpe was born in Chicago, Illinois, on August 17, 1917; he went to grammar school and one year of high school in Chicago; thereafter he left school to work to help support his family (JA 266); when he was 14 years old he began delivering telegrams for Western Union and selling newspapers; subsequently he ran a buffing machine for Consolidated Hair Goods (JA 267), did construction work for McKay Engineering and Construction Company (JA 268), and did construction work for Edison Company and James Stewart Construction Company (JA 269-270); he was deferred from military service because of deafness in one ear (JA 270-1); thereafter he was employed by the United States government as a civilian chauffeur (JA 271-2) and then at the Wilmington Ordnance Plant in Kankakee (JA 272); thereafter he did construction work at the Chrysler plant and for James Stewart Construction Company (JA 272-3), followed by maintenance work in the Chrysler plant (JA 273); in 1939, he was married and now

has 3 children, a 20-year old boy at DePaul University, a 15-year old girl at Barrington High School and a 3-year old boy (JA 265-6); in 1944 he operated a tavern for a short time (JA 273-4); then he operated a second tavern for a short time in partnership with Carmie Garro and a third tavern, Como Village, in partnership with Ray Michaels (JA 274-5); then Volpe and Michaels went into the beer business as County Wide Sales, distributing Alpen Brau beer (JA 275); thereafter Volpe distributed Hamm's, Van Merritt and Berghoff beer as a sub-jobber for John H. Weston (JA 276); and when Van Merritt Brewing Company went into receivership, Volpe closed up his business (JA 278); he is a Fourth Degree, the highest there is, in the Knights of Columbus; he raises funds for Alexian Brothers Foundation and Hospital and for St. Dominick's Youth Foundation for underprivileged children (JA 315-316).

Although he has been involved in the liquor industry in many ways, Volpe has never been arrested or convicted of any crimes of any kind and several witnesses testified without contradiction that they believed that if a permit were granted, Volpe would act in conformity with Federal law (JA 451-2).

The fifteen character witnesses who appeared on Volpe's behalf included three clergymen (JA 153, 154, 215, 394, 395), the vice-president of a large bank (JA 236), a lawyer (JA 251), a teacher (JA 247), a police captain (JA 336, 417), a hotel executive (JA 230), a stock broker (JA 227), a public official (JA 155), four representatives of companies in the liquor industry (JA 187, 239, 244, 249) and the Secretary of the Illinois Liquor Control Commission (JA 205).

The Hearing Examiner found that "it has not been charged that Volpe has a bad reputation" nor that Accardo

had been convicted before or during the period of Volpe's association with him (JA 454). Accardo's conviction upon an income tax charge subsequent to Volpe's association with him was subsequently reversed by the Court of Appeals for the Seventh Circuit (JA 497; *United States* v. *Accardo*, 298 F. 2d 133 (7th Cir., 1962)) and Accardo was subsequently acquitted.

The Hearing Examiner further found (JA 451):

> "32. There is no evidence that Volpe has employed Cerone, Accardo or other persons of ill repute, or had trade or other connections with such persons since he left the employment of Premium on August 10, 1959. Nor is there evidence that either Accardo or Cerone are connected with Seaway or that that company is a subterfuge or front for such individuals to obtain a permit."

The Hearing Examiner also made the following findings of fact, which were adopted by the Assistant Regional Commissioner and affirmed by the Director (JA 451-2):

> "34. No evidence was adduced that any person of ill repute is a shareholder, officer, director, employee or agent, of, or associated or connected in any way with the applicant. * * *
>
> "35. Volpe testified that he would not hire any person of ill repute, even if it were to his economic advantage to do so. * * *
>
> "36. Volpe has never been arrested or convicted of any crimes of any kind, nature or description. * * *
>
> "37. Volpe testified that he is not and has never been a member of any syndicate or ring of hoodlums, that he is not a front for any such syndicate or ring or any other person and that no person other than those set out in the application would have any interest in the business for which he seeks a permit and no contrary evidence is adduced. * * *
>
> "38. Evidence shows that Volpe has a good general reputation as attested by some fifteen witnesses.

"39. Several witnesses testified without contradiction that they were familiar with the permit system of the liquor industry and that in their opinion Volpe would act in conformity with the Federal laws and that he is a decent law abiding citizen."

Of crucial importance was the Hearing Examiner's finding 33 that (JA 451):

"There is no evidence that Volpe had ever done any business with Accardo prior to Accardo's employment by Premium. The negotiations leading up to this employment were initiated by Feicht. * * *"

REASONS FOR GRANTING THE WRIT.

1. This case is important in the administration of the Federal Alcohol Administration Act. The Act has been interpreted and construed by the Director of the Alcohol and Tobacco Tax Division of Internal Revenue Service and by the United States Court of Appeals for the District of Columbia Circuit in this case in such manner that a person's right to pursue the only occupation he has known since his adulthood may be denied solely on the ground of guilt by involuntary association.

A statute must be interpreted as a whole and not by isolating a clause or parts of it. Mr. Justice Frankfurter has said in *Of Law and Men* (1956), at page 59, in his essay on "The Reading of Statutes":

"Frequently the sense of a word cannot be got except by fashioning a mosaic of significance out of the innuendoes of disjointed bits of statute. Cardozo phrased this familiar phenomenon by stating that 'the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view.' *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 433, 439 (1935) (dissenting). And to quote Cardozo once more on this phase of our prob-

lem: 'There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts.' *Duparquet Co.* v. *Evans*, 297 U. S. 216, 218 (1936)."

Section 4(a)(2)(A) provides that a basic permit may be denied if the applicant, or in the case of a corporation any of its officers, directors, or principal stockholders, has within five years prior to the date of application been convicted of a felony under federal or state law or has within three years been convicted of a misdemeanor under any federal law relating to liquor, including the taxation thereof. Under Clause (A) an applicant or officer or director or a principal stockholder of a corporation who has been convicted of a felony earlier than five years prior to the date of application could not be denied a permit. In this context it is inconceivable that Clause (B) can be interpreted to provide that a person who has never been convicted of either a felony or a misdemeanor but who is at best charged with involuntarily associating with a person who has also not been convicted of a felony or misdemeanor may be denied a license. Clause (C) provides that a permit may be denied if the operations proposed to be conducted by the applicant are in violation of the law of the state in which they are to be conducted. Both Clause (A) and Clause (C) provide definite standards, and the type of conduct which they define as disqualifying an applicant for a permit is reasonably related to the purpose for which a permit is sought.

A statute must be interpreted in such a way that its validity is sustained. Clause (B), in order to be valid and constitutional, must be interpreted in such a way that the activity of the applicant must clearly bear some reasonable relation to the type of business which is proposed to be conducted under the permit. The Secretary of the Treasury cannot be constitutionally free to interpret the

words "business experience, financial standing, or trade connections" in any manner he sees fit. In all of the cases decided under this clause the applicant to whom a permit was denied either had been convicted of a felony in a period prior to the five-year period specified in Clause (A) or had previously been illegally engaged in the liquor business or had been guilty of serious infractions which had a direct bearing upon his likelihood of maintaining an operation in the liquor industry in conformity with federal law. . . .

In *Minkoff* v. *Payne*, 93 App. D. C. 123, 210 F. 2d 689 (1953), the court properly held that the same principles apply to liquor licenses as apply to other kinds of license. In 1 Davis, Administrative Law Treatise (1958), § 7.18, the author made the following comment upon *Minkoff* v. *Payne* at page 496:

> "The simple assumption the court made, that one who is lawfully engaged in the sale of liquor is as much entitled as anyone else to fair procedure before a death sentence is imposed upon his business, is one that many state courts still have failed to grasp."

The statute here can not properly be applied on the basis which has been attempted: the permits can not properly be denied on the sole ground that the principal shareholder and officer of the petitioner associated at some prior time with a person who is believed to be of ill repute when, as here, the conduct of the petitioner is unquestioned and the conduct of the principal shareholder and officer of the petitioner, other than the alleged association, is beyond reproach, and when, as here, the association at issue was at the direction of the board of directors of a former corporate employer and has not been shown to be for any illegal or improper purpose.

Not only was Volpe required by his employer to associate with Accardo at the risk of Volpe's losing his em-

ployment but under Illinois law, Volpe, even if he were the president in fact rather than in name only, of Premium would have been required to obey the dictates of the directors of Premium. Illinois law provides (Ill. Rev. Stats., 1961, c. 32, § 157.34) that "*the business and affairs of a corporation shall be managed by a board of directors*" (§ 157.33). The officers are appointed by the directors (§ 157.43), may be removed by the directors (§ 157.44), and "*shall have such authority and perform such duties in the management of the property and affairs of the corporation* as may be provided in the by-laws, or *as may be determined by resolution of the board of directors*. . . ." (§ 157.43).

The president of an Illinois corporation has no authority in the absence of action by the board of directors to enter into, on behalf of the corporation, an unusual or extraordinary contract. *Jaffe v. Chicago Warehouse Lumber Co.*, 4 Ill. App. 2d 415, 124 N. E. 2d 618 (1954); *Goldberg v. Hamburger*, 342 Ill. App. 344, 96 N. E. 2d 636 (1951); *Sacks v. Helene Curtis Industries*, 340 Ill. App. 76, 91 N. E. 2d 127 (1950).

Thus Volpe stands charged of "guilt" by association and even that association was involuntary on his part.

In *St. Louis v. Roche*, 128 Mo. 541, 31 S. W. 915, 917 (1895), a St. Louis ordinance prohibited the knowing, wilful and unlawful association with persons having the reputation of being "thieves, burglars, pickpockets, pigeon droppers, and gamblers," for the purpose of conspiring to aid them in gambling, gaming, and pigeon dropping, at various gambling houses. One Roche was tried and convicted for violation of the ordinance. On appeal to the Missouri Supreme Court the conviction was reversed. The opinion stated:

"The offense consists, not in aiding or abetting in

the commission of some specific unlawful act, or in conspiring to do so, but in knowingly and unlawfully associating with certain persons having the reputation of being thieves and burglars * * * with the design and intent of conspiring * * *. Our constitution and laws guarantee to every citizen the right to go where and when he pleases, exacting from him only that he conduct himself in a decent and orderly manner, that he disturb no one, and that he interfere with the rights of no other citizen * * *.

"However humble may be the citizen arrested under an ordinance prohibiting intercourse with such former criminal, his right to select his own company, so long as no actual breach of law occurs * * * is sacred, and as much under the protection of the state, as though he moved in the more elevated spheres of society."

In the *Roche* case the court reversed the conviction, but did not hold the ordinance unconstitutional except as applied in that case. In the following year, in *Ex parte Smith*, 135 Mo. 223, 36 S. W. 628, 33 L. R. A. 606 (1896), the court held the ordinance invalid on its face.

In *People* v. *Belcastro*, 356 Ill. 144 (1934), the Supreme Court of Illinois held unconstitutional an amendment to the Illinois Vagrancy Act which provided in part that "all persons who * * * are reputed to be habitual violators of criminal laws of this State or of the United States * * * shall be deemed to be, and they are declared to be vagabonds." The Illinois Supreme Court said at page 148:

"* * * No legislative body in this country possesses the power to choose associates for citizens. With mere guilty intention, divorced from an overt act or outward manifestation thereof, the law does not concern itself. (*Ex Parte Smith*, 135 Mo. 223, 36 S. W. 628.) * * *"

In *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939), Lanzetta was convicted of violating the New Jersey Gangster Act of 1934, which provided:

> "Any person not engaged in any lawful occupation known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State, is declared to be a gangster. . . ."

The penalty for conviction as a "gangster" under this law was a fine not exceeding $10,000, or imprisonment not exceeding twenty years, or both. This Court held the law violative of the due process clause of the Fourteenth Amendment because of vagueness in what it purported to denounce, saying:

> "The phrase 'consisting of two or more persons' is all that purports to define 'gang.' The meanings of that word indicated in dictionaries and in historical and sociological writings are numerous and varied. Nor is the meaning derivable from the common law, for neither in that field nor anywhere in the language of the law is there definition of the word. Our attention has not been called to, and we are unable to find, any other statute attempting to make it criminal to be a member of a 'gang.' . . .
>
> "The lack of certainty of the challenged provision is not limited to the word 'gang' or to its dependent 'gangster.' The enactment employs the expression 'known to be a member.' It is ambiguous. There immediately arises the doubt whether actual or putative association is meant. If actual membership is required, the status must be established as a fact, and the word 'known' would be without significance. If reputed membership is enough, there is uncertainty whether that reputation must be general or extend only to some persons. And the statute fails to indicate what constitutes membership or how one may join a 'gang.'"

In Abernathy, *The Right of Assembly and Association* (University of South Carolina Press, 1961), the author concludes on page 200:

> "Thus while association which amounts to conspiracy to commit a crime may be prohibited, mere association with criminals or unsavory characters may not."

See, also, Rice, *Freedom of Association* (New York University Press, 1963).

Mr. Justice Black said in *American Communications Association* v. *Douds*, 339 U. S. 382 (1950) at page 452:

> "These experiences underline the wisdom of the basic constitutional precept that penalties should be imposed only for a person's own conduct, not for his beliefs or for the conduct of others with whom he may associate. * * *"

Mr. Justice Douglas said in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (1951) at pages 178-9:

> "* * * The technique is one of guilt by association—one of the most odious institutions of history. The fact that the technique of guilt by association was used in the proceedings at Nuremberg does not make it congenial to our constitutional scheme. Guilt under our system of government is personal. When we make guilt vicarious we borrow from systems alien to ours and alien to our ethics. Those short-cuts may at times seem to serve noble aims; but we depreciate ourselves by indulging in them. When we deny even the most degraded person the rudiments of a fair trial, we endanger the liberties of everyone. * * *"

Mr. Justice Murphy said in *Bridges* v. *Wixon*, 326 U. S. 135 (1945) at page 163:

> "The doctrine of personal guilt is one of the most fundamental principles of our jurisprudence. It partakes of the very essence of the concept of freedom

and due process of law. *Schneiderman v. United States*, 320 U. S. 118, 154, 63 S. Ct. 1333, 1350, 87 L. Ed. 1796. It prevents the persecution of the innocent for the beliefs and actions of others. See Chafee, Free Speech in the United States (1941), pp. 472-475."

Where, as here, Volpe's previous association with Accardo has not been shown to have been for any illegal or immoral purpose, the statute can not apply.

2. This case is important in defining the relation between the constitutional rights of applicants for basic permits and the power of the administrative agency under the Federal Alcohol Administration Act. If the Act did not deal with the liquor industry it is inconceivable that any court would have ever held that a permit could constitutionally be denied simply because the applicant "is by reason of his business experience . . . or trade connections, not likely . . . to maintain operations in conformity with Federal law." "Not likely" are words which permit the administrator of the Act to operate with unbridled discretion and to deny permits arbitrarily and at his caprice.

Until this case, however, the legislative standard has never actually been tested because in each case arising under the Act the applicant to whom a permit had been denied had, by any standard, clearly disqualified himself.

In *Atlanta Beer Distributing Co. v. Alexander*, 93 F. 2d 11 (5th Cir., 1937), which was relied upon by the Director in his order in the present case (JA 496), Oran Dodd was the sole shareholder, one of two directors, and the president and treasurer of the petitioner, Atlanta Beer Distributing Co. Dodd had been convicted five times in State and federal courts but had not been convicted of a felony within five years nor of a misdemeanor within three years of the date of the application for a permit. Dodd's conduct and his five convictions distinguish the *Atlanta Beer*

case sharply from the present case. However, even in that case, one of the three judges filed a vigorous dissent in which he stated that Dodd's actions should have no influence over the granting of a permit to the corporation so long as the corporation itself by reason of its own business experience, financial standing, and trade connections was not in violation of any of the three clauses of Section 4(a) (2). The dissenting judge stated at page 13:

> "* * * [The corporation's] * * * reputation as law abiding, industrious, and financially sound is attested by officials and business men of prominence and standing in the community, and no one brings a word of reproach against it * * *"

The facts in a case such as *Pincourt* v. *Palmer*, 190 F. 2d 390 (3rd Cir., 1951), relied upon by the Hearing Examiner and Assistant Regional Commissioner, are clearly distinguishable. *Pincourt offered no evidence of any kind at the hearing* before the examiner, who found that while holding a former permit, Pincourt was guilty of repeated violations of law including misbranding, failure to keep records and failure to pay taxes. He engaged in black market activities, made false statements to Federal agents, unhesitatingly gave false testimony in a Federal Court, which resulted in his acquittal of charges of conspiracy to violate O.P.A. regulations, stole liquor from his customers and issued false copies of official government reports. His experience in legitimate business activity was slight. Pincourt's defense was that the same laws had been violated frequently by others and that his stealing from customers was a small percentage of the liquor he handled. The court did not find it necessary to comment on his cynicism and found the arguments unconvincing. Reliance upon the *Pincourt* case or other cases decided under Section 4(a). (2). (B) are clearly erroneous, especially in view of the Hearing Examiner's Findings that Volpe

has a good general reputation, that he is a decent, law-abiding citizen, and, in the opinion of persons familiar with the permit system of the liquor industry, Volpe would act in conformity with the law (JA 451-2).

In *Arrow Distilleries, Inc.* v. *Alexander*, 109 F. 2d 397 (7th Cir., 1940), the suspension of the petitioner's basic permits was affirmed where the evidence showed false entries in its records, sale of liquor to bootleggers and mis-branding of whiskey delivered in interstate commerce.

In *Owings Mills Distillery, Inc.* v. *Helvering*, 124 F. 2d 379, (4th Cir., 1942), the revocation of basic permits was affirmed where the evidence showed that the petitioner, its former president and principal stockholder and the president's son had been convicted of violating Federal liquor laws, that the present principal stockholders attempted to bribe investigators and had long police records, one of them having had 54 arrests and 16 convictions and the other having been arrested 3 times for liquor violations with one conviction.

In *Minkoff* v. *Payne*, 93 App. D. C. 123, 210 F. 2d 689 (1953), the Court affirmed the denial of the renewal of a liquor license where the applicant had made false and fraudulent entries in its books and records, had conspired with bootleggers to make false entries and had failed to make other entries required by law. Even in that case, however, this Court said at page 693:

> "In affirming the judgment we do so without prejudice to consideration by the Board of any application for a new license which the appellant might file or have pending. The findings which led to the Board action relate to conduct which terminated more than four years ago. The moral character and fitness of the appellant are not necessarily predetermined forever by what then was found to have occurred. Though we affirm and will cause to be dissolved, when our mandate issues, all existing stays or injunctions against

the Board, we do not preclude the current exercise of its judgment with respect to appellant should it have occasion to do so."

3. The Court of Appeals in this case has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The findings of the administrative agency (1) that no person of ill repute is a shareholder, officer, director, employee or agent of, or associated or connected in any way with the petitioner, (2) that Dominic Volpe, the sole shareholder and president of the petitioner, has a good general reputation, (3) that Volpe has never been arrested or convicted of any crimes of any kind, nature or description and (4) that several witnesses testified without contradiction that they were familiar with the permit system of the liquor industry and that Volpe would act in conformity with the Federal laws and that he was a decent, law-abiding citizen, required that an order be entered granting the basic permits sought by the petitioner.

Volpe's association with Anthony J. Accardo during the time when Volpe was president of Premium Beer Sales, Inc. and Accardo was employed by Premium, is not a sufficient basis or denying basic permits to petitioner in view of the entire record which shows (1) that Henry Morgen, the sole shareholder and controlling head of Premium, completely dominated and controlled Premium, before and after he made Volpe president; (2) that the document between Accardo and Premium was signed by Volpe at the direction and command of Morgen without Volpe being given the permission or the opportunity to read the document, and without being told and without knowing the nature of the document or the fact that Accardo was a party to it; (3) that Volpe was in the company

of Accardo on a limited number of occasions and that in each case he was so ordered by Morgen as part of Volpe's duties as an employee of Premium, and on no occasion for any unlawful or immoral purpose; (4) that Volpe had never done any business with Accardo prior to Accardo's employment by Premium; (5) that Arthur J. Feicht, the president and chairman of the board of directors of Fox Head Brewing Company, and Morgen, desired to enter into the arrangement with Accardo and they would have accomplished this result with or without procuring Volpe to sign the employment document and whether or not Volpe would appear at a few social functions with Accardo and these at the direction of Morgen; (6) that Volpe had the choice of keeping his job or losing it and regardless of which course he took, Feicht and Morgen would have accomplished the same result in regard to Accardo; (7) that when Volpe had ownership and was in control of County Wide Beer Sales Corporation from 1946 to 1952, that corporation held a basic permit under the Federal Alcohol Administration Act without any revocation or suspension thereof; (8) that Volpe operated and owned or controlled four retail liquor establishments in full conformity with the law; (9) that the government did not introduce any evidence to contradict the good general reputation proved by Volpe; (10) that Accardo had not been convicted before or during the period of Volpe's association with him and Accardo's conviction upon an income tax charge subsequent to Volpe's association with him was subsequently reversed by the Court of Appeals for the Seventh Circuit (*United States v. Accardo*, 298 F. 2d 133 (7th Cir., 1962), which Court held that Accardo's income tax returns from 1949 to 1955 were inadmissible in Accardo's own trial, and Accardo was subsequently acquitted; (11) that the Director could not erase from this record the fact that the conviction and the improper income tax returns of Accardo were part

of this record and undoubtedly had their influence upon the hearing examiner and upon the Assistant Regional Commissioner and that if the Accardo income tax returns were improper in Accardo's own case, they were manifestly more improper in the case of the petitioner who had no connection whatsoever with such returns; (12) that the hearing examiner received in evidence a series of newspaper clippings referring to Accardo, which newspaper clippings were hearsay, were not subject to cross-examination and were inadmissible; and that (13) there is no evidence in the record that the government ever revoked or suspended Premium's or Fox Head Brewing Company's permits because of the Accardo association, although Accardo's returns for 1956, 1957 and 1958 showed income from Premium.

The government introduced, and the hearing examiner received in evidence, as Governme Exhibit 3 a certified copy of the conviction of Anthony Joseph Accardo on November 18, 1960 for violation of Section 7206(1), Title 26 of the United States Code (JA 131-132). The government also introduced, and the hearing examiner received in evidence, as Government Exhibit 6 of the federal income tax returns of Accardo for the years 1940, 1941, 1942, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953 and 1954 (JA 144-46). The government also introduced, and the hearing examiner received in evidence, as Government Exhibit 7 the federal income tax returns of Accardo for the years 1956, 1957 and 1958 (JA 146-7, 388-393).

On July 28, 1961, the hearing examiner recommended that the application of the petitioner be denied (JA 420-455). On September 5, 1961, the Assistant Regional Commissioner adopted the recommendations of the hearing examiner and denied the application (JA 467-481).

On January 5, 1962, the Court of Appeals for the Seventh

Circuit reversed the conviction of Accardo (a certified copy of which conviction was introduced in the present case as Government Exhibit 3) on several grounds, one of which was the improper introduction in the *Accardo* case of Accardo's federal income tax returns for the years 1940-1955. The Court of Appeals said in its opinion (298 F. 2d 133):

> "There was prejudicial error also in the trial court's admission, over objection, of evidence of defendant's income tax returns for the years 1940 through 1955. The court admitted the evidence to show 'motive, intent, or willful conduct.'
>
> • • • • • •
>
> "The income tax returns were introduced, and several witnesses testified to the preparation of the returns and to conversations with defendant about the sources of his income for those years. • • •
>
> • • • • •
>
> "The impact of this testimony on the trial judge indicates the probable prejudicial impact the testimony had on the jury. In denying the defendant's motion for a new trial, the trial court said:
>
> "'I don't know how a defendant could have been engaged in that kind of enterprise, it would seem to me, without relying on the connivance of certain public officials. That is not in evidence, but I think that a reasonable inference from the record in this case. • • • I think the only conclusion one can draw from the huge amounts of income reported by the defendant and as revealed from the evidence is that this is a malignancy, this professional gambling, which has penetrated all levels of our society, and that it is a national calamity.'
>
> "We conclude that the highly prejudicial evidence was not relevant and was inadmissible, that the court had no discretion to admit it, and that the careful instruction with respect to the evidence could not cure the error because the evidence should not have been admitted."

In a concurring opinion, Judge Duffy said:

"* * * The manner in which the 1940-1955 income tax returns was handled, in my opinion, was prejudicial to the right of the defendant to have a fair trial on the charges which were then before the court."

In affirming on March 27, 1962, the Assistant Regional Commissioner's decision denying the applications for permits, the Director of the Alcohol and Tobacco Tax Division stated that he was aware that the conviction of Accardo had been reversed and remanded by the United States Court of Appeals for the Seventh Circuit, but that the presence of the conviction judgment (Government Exhibit 3) had not influenced his decision (JA 497). However, at this time the Director could not erase from the record the fact that the conviction and the improper income tax returns were already part of the record and undoubtedly had their influence upon the hearing examiner and upon the Assistant Regional Commissioner. If the Accardo income tax returns were improper in Accardo's own case, they were manifestly more improper in the case of the petitioner who had no connection whatsoever with such returns. Furthermore, at a later time Accardo himself was acquitted by a judge and jury.

The government offered, and the hearing examiner received in evidence, as Government Exhibits 4 and 5, a series of newspaper clippings referring to Accardo (JA 135-142, 150, 349-387). It is clear that the newspaper clippings were hearsay, were not subject to cross-examination, were inadmissible and were highly prejudicial. The government argued that all of this prejudicial, inflammatory, non-cross-examinable material was introduced for the "limited purpose" of showing Accardo's reputation (government brief, pages 23-27).

The opinion of the Court of Appeals demonstrates that

the Court was influenced, as was the Hearing Examiner, the Assistant Regional Commissioner and the Director, by the highly-inflammatory material supposedly introduced for a "limited purpose." It is virtually impossible for the human mind—including the trained minds of judicial officers—to be exposed to an avalanche of prejudicial matter and not to accept such matters as though it were unlimited and undisputed proof equal in every respect to evidence which has met the test of cross-examination.

Thus the Court discusses (footnote 3, *infra*, page 39) what Morgen, according to the Court, "is reported to have testified" in the "United States District Court in Chicago." Although the Court states that "no reliance is or need be placed on it," it is obvious that the Court was influenced by, and treated as evidence, a prejudicial, non-cross-examined newspaper clipping, the veracity of which was completely untested. But even more destructive of constitutional rights is the manner in which such material may even on its face be misread. The newspaper clipping in question appears at JA 372. Although it mentioned a Federal district court case, the clipping does not state that Morgen testified in court in the course of that case. In fact the item commences with the words, "the Chairman of Premium Beer Sales, Inc., couldn't shed any light *Sunday* on what Tony Accardo, mob chieftain, did . . ." The clipping then states that "Volpe . . . could not be reached at his home" to comment. The story clearly indicates that Morgen was purportedly telephoned or talked to by a reporter when the statements quoted in the Court's opinion were allegedly made. The members of this Court have undoubtedly had sufficient experience with being "quoted" in the press to take judicial notice that not only are such "quotations" subject to error in communication but more often than not, particularly in news items where no particular writer assumes the responsibility for the item, the

"quotation" is not correct. Yet here a Court of Appeals accepts as evidence and is influenced enough to quote in its opinion a highly prejudicial, unverified, un-cross-examined newspaper clipping and compounds the prejudice by misreading the clipping to convey an anonymous reporter's story into testimony given in a Federal district court.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

1. STATUTORY PROVISIONS CITED AND QUOTED

Section 4 of the Federal Alcohol Administration Act (49 Stat. 977 et seq., as amended, U.S.C.A., Title 27, § 204):

"Sec. 4. (a) The following persons shall, on application therefor, be entitled to a basic permit:

"(1) Any person who, on May 25, 1935, held a basic permit as distiller, rectifier, wine producer, or importer issued by an agency of the Federal Government.

"(2) Any other person unless the Secretary of the Treasury finds (A) that such person (or in case of a corporation, any of its officers, directors, or principal stockholders) has, within five years prior to date of application been convicted of a felony under Federal or State law or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor, including the taxation thereof; or (B) that such person is, by reason of his business experience, financial standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted."

2. OPINION OF COURT OF APPEALS.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit.

No. 17045

SEAWAY BEVERAGES, INC., PETITIONER,

v.

C. DOUGLAS DILLON, Secretary of the Treasury of the United States, et al., RESPONDENTS.

PETITION TO REVIEW ORDER OF SECRETARY OF TREASURY AND DIRECTOR OF ALCOHOL AND TOBACCO TAX DIVISION.

Decided April 11, 1963.

Mr. Mandel L. Anixter, with whom *Messrs. Joseph B. Danzansky* and *Raymond R. Dickey* were on the brief, for petitioner.

Mr. Elliott H. Moyer, Attorney, Department of Justice, for respondents.

Before WILBUR K. MILLER, FAHY and BURGER, *Circuit Judges*.

BURGER, *Circuit Judge:* Acting under Section 4(a) (2) of the Federal Alcohol Administration Act,[1] the Secretary of the Treasury denied pentioner's application for new basic permits as a wholesaler and importer of malt beverages. The action of the Secretary was taken under the above cited statute which in essence authorizes him to grant per-

1. 49 Stat. 977, *et seq.*, as amended, 27 U. S. C. §204 (a) (2).

mits unless he finds that the person applying, or in case of a corporation, any of its officers, directors or principal stockholders, has been convicted of specified crimes or misdemeanors or by reason of trade connections is not likely to operate in conformity with federal law.

Petitioner, Seaway Beverages, Inc., whose president and sole stockholder is Dominic Volpe, makes two contentions here: (a) that the findings under this section of the statute concerning Volpe's prior "associations" are not supported by substantial evidence on the record as a whole, and (b) the Act cannot properly be interpreted so as to deny permits on the sole ground that Volpe, the principal shareholder and chief executive officer of petitioner, was associated in business with a person of ill repute where, as here, the conduct of corporate petitioner is unquestioned and the conduct and reputation of Volpe, apart from the "associations" with one Accardo, are good. Petitioner contends in essence that Volpe's limited business associations with a known racketeer, Accardo, in circumstances where such association was compelled by his employment as Sales Manager and President of a beer distributing company, is not sufficient to outweigh Volpe's lifetime record of no arrests or convictions and the evidence of numerous character witnesses, including clergymen, lawyers, police officers and others. It is argued that failure to accept the undisputed testimony of character witnesses was arbitrary.

After an extended hearing on the application, petitioner was given a formal Notice of Contemplated Disapproval of Application For Permit which recited as grounds for disapproval:

> 1. During the period 1953-1956, while sales manager of Premium Beer Sales, Inc., Dominic Volpe knowingly associated with and caused to be employed as a beer salesman one Jack Cerone, a person alleged to be of ill repute and a member of a group of hoodlums headed by Anthony J. Accardo.

2. During the period 1956-1969, while President of Premium Beer Sales, Inc., Dominic Volpe knowingly associated with and assisted in the employment as a beer salesman of Anthony J. Accardo, alias Tony Accardo, alias Joe Batters, a person of ill repute and alleged leader of Chicago hoodlums.

The ultimate action of the Secretary predicated on the Hearing Examiner's Findings did not rely on the matter contained in paragraph 1. The Director's Memorandum Opinion stated:

> After considering the complete record in this case, it is my opinion that the primary issue before me is whether the evidence of record as to Mr. Volpe's "business experience" and "trade connections," exemplified by his association with Anthony J. Accardo, his role in the alleged employment of Anthony J. Accardo by Premium Beer Sales, Inc., and his relationship to alleged "salesman" Anthony J. Accardo after that alleged employment, adequately support the finding that the applicant is not likely to maintain operations in conformity with Federal law and whether the explanations in the record, particularly that of Mr. Volpe, of such association, role and relationship and the testimony as to Mr. Volpe's good reputation, establish that the applicant will be likely to maintain its operations in conformity with Federal law.

As to paragraph 2 it was stated:

> The very terms of the employment contract [signed by Accardo and by Volpe for Premium], and the facts and circumstances surrounding his employment, smack of racketeer operation [of Premium] and indicate that Accardo was employed because of his reputed underworld connections and his ability to influence, if not actually coerce, purchases by retail outlets.

The order under review rested on findings that Volpe as President and Sales Manager of Premium Beer Sales, Inc., of Chicago, participated in or acquiesced in the introduc-

tion of racketeering influences in the beverage industry by the employment of Anthony J. Accardo as a "beer salesman" at $60,000 annually plus substantial commissions at a time when Accardo's admitted general reputation in Chicago was that of a notorious racketeer and gangster. The record as to Accardo's bad reputation is not challenged. The record also shows contacts of Volpe with Accardo while Volpe was Sales Manager of Premium in preliminary meetings where Accardo's contemplated employment to promote beer sales and the amount of his salary were discussed; it shows numerous contacts with Accardo after he was employed by Premium. While Accardo is not shown to have actually performed any of his duties in the offices of Premium, it appears that there was a marked increase in beer sales after he was employed. It was subsequent to these preliminary negotiations that Volpe, by then President of Premium, signed a written contract with Accardo on the very unusual terms referred to. It is admitted that $12,000 to $15,000 per year was more or less standard as earnings of beer salesmen. Volpe's explanation of his signing the Accardo contract was that he always did whatever he was told to do by Henry Morgen, Board Chairman and former President of Premium.

Undisputed evidence shows that Accardo's connection was exploited in other ways than the direct promotion of beer sales. Testimony showed that officers of Fox Head Brewing Co., whose beer Premium distributed, urged a prospective investor to buy stock of Fox Head not only because it was a "better beer" but because Fox Head, as its President stated, "was going to have—and I sometimes hesitate to say this—Tony Accardo help him sell it with some of his friends."

Petitioner's challenge to the factual basis for the finding of Volpe's associations with Accardo falls upon an exami-

nation of the record and carefully documented findings. We are satisfied that the Director and the Secretary did not ignore testimony favorable to Volpe as to his general reputation. But we cannot say that generalizations concerning Volpe's general reputation in the community were adequate to outweigh concrete evidence that Volpe had close associations with Accardo in business and socially. Volpe continued to be Sales Manager of Premium after he was made President and the only claim functions of Accardo had to do with sales. Volpe makes no claim that he did not know Accardo's reputation as a gangster and racketeer in the Chicago underworld, and on the basis of the record it would have been idle for him to do so.

Petitioner's contention that he was not a "free agent" in the steps leading to Accardo's employment and the execu-

2. "15. Prior to the hiring of Accardo on or about May 1, 1956, Volpe, Cerone, and Feight visited the home of Accardo in River Forest, Illinois, where possible employment of Accardo by Fox Head was discussed.

17. A week or two after the meeting referred to in Finding 16, Volpe met Arthur Feight and John Chmelman, both directors of the Fox Head Brewery, at Cerone's home and they proceeded with Cerone from there to a meeting with Anthony Accardo, Murrey Humphreys and Eugene Bernstein to the Armory Lounge, Forest Park, Illinois, where prospective employment of Accardo was discussed.

18. Volpe and Feight attended an Italian Festival in Franklin Park or Melrose Park, Illinois, where they met Accardo.

21. Volpe attended a 4th of July party at the home of Accardo in 1956.

23. Volpe went to Accardo's home on several occasions to give him messages and point sales of sales material.

24. Anthony Accardo and Jack Cerone attended a christening of a child of Volpes' in 1957.

27. Between April 1956 and August 1959, Volpe went on a five or six-day fishing trip to the Island of Bimini in the Bahamas with Anthony Accardo and Jack Cerone.

tions of the unique employment contract was found "not believable." We perceive no basis for disturbing these finding and conclusions. The Director of Alcohol and Tobacco Tax Division of Internal Revenue Service in reviewing the Examiner's findings concluded that, even assuming the alleged dominance of Volpe by Morgen, Board Chairman of Premium,[3] as Volpe contended, this constituted an admission by petitioner that Volpe was a willing "tool" or "front" for known racketeers and hoodlums whom he would be unlikely to resist in future operations under the license sought.

Certainly it is clear that the objective of Congress[4] was to keep racketeer and hoodlum influence out of that phase of the beer business which lies within the regulatory power of Congress. It is equally clear that there is abundant evidence to support findings that Volpe had associated intimately with and acted as a business "front" for such noxious influences in the past and as recently as 1959, and under the statute such a finding warranted denial of the permits sought.

The order denying petitioner's application for basic permits is therefore

Affirmed.

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3. Interestingly, although no reliance is or need be placed on it, Morgen, in this period when asked to explain Accardo's large salary from Premium in a case in the United States District Court in Chicago, is reported to have testified that he did not know who worked for Premium and that Volpe "runs the show" and that he, Morgen, had sold his interest to Volpe.

4. H. R. Rep. No. 1542, 74th Cong., 1st Sess., 3 to 8; S. Rep. No. 1215, 74th Cong., 1st Sess., 1-3.

3. JUDGMENT OF COURT OF APPEALS

United States Court of Appeals,

For the District of Columbia Circuit.

No. 17,945 September Term, 1962.

Seaway Beverages, Inc., *Petitioner*,

vs.

C. Douglas Dillon, Secretary of the Treasury of the United States, et al., *Respondents*.

On Petition to Review Order of Secretary of the Treasury and Director of Alcohol and Tobacco Tax Division.

Before: Wilbur K. Miller, Fahy and Burger, Circuit Judges.

JUDGMENT

This case came on to be heard on the record from the Alcohol and Tobacco Tax Division, Internal Revenue Service, Treasury Department, and was argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the order on review in this case is hereby affirmed.

Per Circuit Judge Burger.

4. ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 17,045 September Term, 1962

SEAWAY BEVERAGES, INC.,
Petitioner

vs.

C. DOUGLAS DILLON, Secretary of the Treasury of the United States, et al.,
Respondents

Before: Wilbur K. Miller, Davis and Burger,
Circuit Judges, in Chambers

ORDER

On consideration of petitioner's petition for rehearing, it is

ORDERED by the court that the petition is hereby denied.

Per Curiam

Dated: June 3, 1963

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711-412—63— 1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 429

SEAWAY BEVERAGES, INC., PETITIONER

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 34–39) is reported at 319 F. 2d 722.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1963 (Pet. 40), and a petition for rehearing was denied on June 3, 1963 (Pet. 41). The petition for a writ of certiorari was filed on September 3, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the Secretary's finding that, in the light of its sole stockholder's association with reputed racketeers in an earlier beer distributing business, the petitioner corporation was not likely to maintain operations as a wholesaler and importer of beer in conformity with federal law.

2. Whether that finding justified the Secretary's denial, under § 4(a)(2)(B) of the Federal Alcohol Administration Act (27 U.S.C. 204(a)(2)), of petitioner's application for a permit to distribute beer.

STATUTE INVOLVED

Sections 3(e), 4(a), and 5(a) of the Federal Alcohol Administration Act, 49 Stat. 977 (as amended, 27 U.S.C. 201 *et seq.*) are set forth in relevant part in the Appendix, pp. 15–16, *infra*.

STATEMENT

1. From 1953 to 1959, Dominic Volpe was the sales manager and, after 1956, the president of Premium Beer Sales, Inc., an importer and wholesaler of malt beverages in Chicago, Illinois. All of the stock of Premium was owned by Henry Morgen, who died on March 3, 1959. Following Morgen's death, Volpe formed and became the sole stockholder and president of a new corporation which, on August 11, 1959, purchased Premium's inventory, office equipment, and trucks (R. 447).[1] On August 31, 1959, the new corpo-

[1] "R." refers to the printed Joint Appendix filed in the court of appeals.

ration, petitioner Seaway Beverages, Inc., filed applications under § 4 of the Federal Alcohol Administration Act (27 U.S.C. 204) for the necessary permits to engage in business as an importer and wholesaler of malt beverages.[2]

On December 6, 1960, the Assistant Regional Commissioner of the Alcohol and Tobacco Tax Division of the Internal Revenue Service notified petitioner that its applications would be denied unless it requested a hearing within the time prescribed. The notice stated the following ground for the proposed denial (R. 40, 42):

> The applicant, by reason of the business experience and trade connections of Dominic Volpe, President, Treasurer, Director and sole stockholder thereof, is not likely to maintain operations in conformity with federal law within the meaning of Section 4(a)(2)(B) of the Federal Alcohol Administration Act * * * in that:
>
> 1. During the period 1953–1956, while sales manager of Premium Beer Sales, Inc., Dominic Volpe knowingly associated with and caused to be employed as a beer salesman one Jack Cerone, a person alleged to be of ill repute and a member of a group of hoodlums headed by Anthony J. Accardo.
>
> 2. During the period 1956–1959, while President of Premium Beer Sales, Inc., Dominic Volpe knowingly associated with and assisted in the employment as a beer salesman of An-

[2] Pending final disposition of its applications, petitioner, as Premium's successor, has been permitted to engage in business under Premium's permits, as authorized by § 4(g) of the Act.

thony J. Accardo, alias Tony Accardo, alias Joe Batters, a person of ill repute and alleged leader of Chicago hoodlums.

In due course, petitioner requested a hearing. Following a hearing, the hearing examiner filed a recommended decision denying the applications (R. 420–455). The Assistant Regional Commissioner overruled petititoner's exceptions and, with slight modifications, adopted the hearing examiner's findings and recommended decision (R. 467–481). The Director of the Alcohol and Tobacco Tax Division affirmed the Assistant Regional Commissioner's decision and, exercising the power delegated to him by the Secretary of the Treasury, entered a final order denying petitioner's applications (R. 487–497). The court of appeals, on direct review of the order under § 4(h) of the Act, affirmed (Pet. 34–39).

2. The denial of the permits was based entirely on Volpe's relationship, while sales manager and president of Premium, with Cerone and Accardo. The facts of that relationship may be summarized as follows:

Volpe first met Cerone in 1948 or 1949, when Cerone was engaged in selling neon signs to taverns. In late 1955 or early 1956, on Volpe's recommendation, Cerone was hired by the Fox Head Brewing Company as a salesman in the area for which Premium was Fox Head's distributor (R. 425, 447–448, 469). Volpe later introduced Cerone to Arthur Feicht, the president of Fox Head (R. 448). Volpe, Cerone and Feicht thereafter took a trip together to the brewery in Wisconsin and met on various other occasions, including

one time at Cerone's home (R. 448–449, 438). On one occasion, Cerone told Feicht, in Volpe's presence, that he knew someone who could sell "one hundred times" as much beer as he could, mentioning Accardo's name. A short time later, Cerone took Feicht and Volpe to Accardo's home, where they were introduced to Accardo and discussed his possible employment by Fox Head (R. 449, 439). A week or two later, Volpe attended a meeting at the Armory Lounge in Forest Park, Illinois, with Accardo, Feicht, Cerone and others at which Accardo's employment by Fox Head was discussed further. (R. 449). The board of directors of Fox Head decided not to hire Accardo, but on or about May 1, 1956, Volpe, who had just been made president of Premium, signed an employment contract between Premium and Accardo (R. 449, 424). The contract required Premium to pay Accardo (or, if he should die after a year's service, his heirs) $65,000 a year for four and a half years, purportedly for his services as a salesman (R. 449–450, 426). Premium continued to make payments to Accardo, with checks signed by Volpe, until it ceased doing business in 1959 (R. 450). There is some indication in the record, but no finding, that Fox Head was to reimburse Premium for its payments to Accardo (R. 424, 312–313).

Volpe's other associations with Accardo and Cerone while he was president of Premium included the following: he and Feicht attended an Italian festival where they met Accardo; he attended a Fourth of July party at Accardo's home in 1956 and at Cerone's

home in 1957; he took messages to Accardo's home on several occasions; Accardo and Cerone attended a christening of Volpe's child in 1957; he went with Cerone on trips to New York and Florida to see distributors; and he went on a five-day fishing trip in the Bahamas with Accardo and Cerone (R. 449–450).

3. It was found that both Accardo and Cerone were persons with "a very bad reputation" in the Chicago area (R. 451). Petitioner took no exception to those findings. Nor did it challenge the basic facts of Volpe's dealings with Accardo and Cerone. Volpe claimed, however, that in all of his contacts with them he was acting on orders of Henry Morgen, the sole stockholder of Premium, and that he did not read the Accardo contract before signing it (at Morgen's direction), and learned of its contents only several days later.

The hearing examiner (R. 445, 455), the Assistant Regional Commissioner (R. 475), and the Director all rejected Volpe's disclaimers of responsibility as not worthy of belief, with the Director concluding that "Volpe's testimony is at variance with probable facts and legitimate inferences" (R. 495). Alternatively, the Director found that, even if Volpe's claim of total dominance by Morgen were true, it would only establish Volpe to be a mere "tool" who, having been so "weak" and easily dominated in the past, would not be "likely to so conduct the affairs of the applicant corporation as to keep them immune from racketeer influences and to maintain operations in conformity with Federal law" (R. 494).

After reviewing Volpe's participation in Accardo's employment, the Director found (R. 491):

> The record discloses that Anthony J. Accardo has a reputation in the Chicago area as a racketeer. * * * The very terms of the employment contract, and the facts and circumstances surrounding his employment, smack of a racketeer operation and indicate that Accardo was employed because of his reputed underworld connections and his ability to influence, if not actually coerce, purchases by retail outlets.

Inasmuch as Volpe had thus "permitted a person with the reputation of a racketeer to enter the alcoholic beverage business," the Director concluded that "I am not convinced from the record in this case that, if permits were to be issued, a similar result could not reasonably be expected" (R. 493). He accordingly adopted the recommended finding that, in view of its sole stockholder and president's demonstrated willingness to deal with reputed racketeers in the distribution of alcoholic beverages, the "applicant is not likely to maintain operations in conformity with Federal law" and denied the applications (R. 497, 454). The court of appeals, as noted above, affirmed the order (Pet. 34–39).

ARGUMENT

1. Petitioner contends that Volpe's prior role as president and sales manager of a company that utilized, in the sale and distribution of alcoholic beverages, the services of persons with notorious reputations as racketeers (Cerone and Accardo) was not a

sufficient basis for the denial of a permit to his corporation under § 4(a) of the Federal Alcohol Administration Act. The contention is without merit.

a. A primary purpose of the permit system established by the Act was to keep the alcoholic beverage industry free from the racketeer influences to which Congress believed it to be peculiarly subject. As explained in the committee reports (H. Rep. 1542, 74th Cong., 1st Sess., p. 3; S. Rep. 1215, 74th Cong., 1st Sess., p. 2):

> The bootlegger and the racketeer have not yet disappeared from our national life. Under existing Federal law there is no means of keeping the criminal from entering the legalized liquor field. The executive branch of the Government (except to a limited extent in the case of distilleries) is powerless to prevent the most notorious criminal from entering into the business of production or distribution of alcoholic beverages. The revenue cannot be adequately protected, the "tied-house" control cannot be curbed, [*] the public cannot be protected from unscrupulous advertising, the consumer cannot be protected from deceptive labeling practices; in short, the legalized liquor traffic cannot be effectively regulated, if the door is let open for highly financed gangs of criminals and racketeers to enter into the business of liquor production and distribution.

Taking note that there were "extraordinary incentives" in the liquor business "to ignore requirements of law" and that the "history of the enforcement of

[*] Section 5(a) of the Act makes it unlawful for any wholesaler of alcoholic beverages to require any retailer, by agreement or otherwise, to purchase exclusively from it.

liquor laws in this country has been characterized by wide-spread violations and evasions," the committee concluded that "Relatively drastic enforcement methods, such as the permit system, therefore become necessary." H. Rep. 1542, *supra*, at p. 6. It is in the light of that history that the broad power of the Secretary to deny a permit to any person he finds "is, by reason of his business experience * * * or trade connections, not likely * * * to maintain * * * operations in conformity with Federal law" must be construed.

Despite petitioner's attempt so to characterize it, this case does not involve the denial of a permit on the basis of an applicant's mere "associations." The decision of the Director turned, not upon Volpe's associations at large, but upon his direct participation in the hiring of a person with a reputation as a notorious racketeer to be a "salesman" of alcoholic beverages. Nor was Accardo's reputation merely coincidental to an otherwise innocent transaction, for it was found that he was hired specifically "because of his reputed underworld connections and his ability to influence, if not actually coerce, purchases by retail outlets" (R. 491). The decision was thus based on findings of specific conduct directly demonstrating Volpe's willingness to utilize coercive racketeer influences in the distribution of alcoholic beverages. If those findings are supported by the evidence, they fully justified the denial of a permit to Volpe's wholly-owned corporation. And whether the evidence does support the findings—

as we submit it plainly does—is obviously not a question warranting further review by this Court.

b. Petitioner's contention that Volpe's participation in the relevant events was "involuntary" is not only contrary to the findings but is in any event immaterial. What petitioner means by "involuntary" (see Pet. 18–19, 27) is that it was necessary for him to do the things he did if he wanted to keep his job. But the desire to protect a capital investment is no less strong a motivating force than the desire to keep a job, and from Volpe's demonstrated willingness to participate in bringing reputed racketeers into the alcoholic beverage industry when his job depended upon it, it was reasonable, we submit, for the Director to draw the inference that Volpe would be likely to pursue a similar course in the future if the financial success of his new corporation should depend upon it. The crucial fact is that, with full knowledge of what was happening, Volpe chose to remain associated with the enterprise—and, hopefully, to share in whatever fruits the new alliance might bring to Premium.*

2. The suggestion, if petitioner means to make it (Pet. 23), that the statutory standard is so imprecise as to be unconstitutional as a delegation of legislative power is answered by *Ma-King Products Co.* v. *Blair*, 271 U.S. 479. There, the Commissioner of Internal Revenue had denied an application under the National Prohibition Act for a permit to operate

* Contemporaneously with the hiring of Addardo, Morgen promised Volpe an increase from 25 percent to 40 percent in his bonus participation in Premium's earnings (R. 308, 320).

an alcohol-denaturing plant because the principal officers of the applicant had been conveyancers for a savings and loan association some of the directors of which had, in turn, been charged with liquor-law violations. Unlike the present statute, that Act did not prescribe the grounds on which permits might be denied. Relying upon its use of permissive rather than mandatory language, however, this Court construed the Act as authorizing the Commissioner "to refuse a permit to one who is not a suitable person to be entrusted, in a relation of such confidence, with the possession of liquor susceptible of diversion to beverage uses" (p. 482). The Court accordingly affirmed the decision of the court of appeals that "the associations and business connections of the principal officers of the company were such that [the Commissioner] had ample ground for declining to issue the permit" (p. 483).

In authorizing the Secretary to deny a permit to any person he finds "is, by reason of his business experience * * * or trade connections, not likely * * * to maintain such operations in conformity with Federal law," the present statute simply makes express the power this Court found implicit in the earlier legislation. If the National Prohibition Act, as interpreted in *Ma-King*, did not delegate an overly broad discretion, *a fortiori* the delegation in the more explicit Federal Alcohol Administration Act is valid.

3. Petitioner complains, finally, of the introduction into evidence of Accardo's conviction, later reversed, for making false statements in income tax returns,

of Accardo's income tax returns, and of newspaper clippings describing Accardo as the reputed leader of Chicago racketeers (Pet. 26-32). Those exhibits, however, were only cumulative evidence going to Accardo's reputation as a racketeer, a reputation that had already been established by the direct testimony of the Director of the Chicago Crime Commission (R. 66) and the Deputy Superintendent of Police in Chicago (R. 57, 61) and by evidence of admissions made by Accardo in Volpe's presence (R. 91, 301, 320). In any event, at no time has petitioner ever excepted to the findings of the bad reputations of Cerone and Accardo (see R. 457-466, 4[illegible]-487), and the issue is now foreclosed by the provision of § 4(h) of the Act that "No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before the Secretary or unless there were reasonable grounds for failure to do so." Indeed, since petitioner does not even now challenge the ultimate findings as to Cerone's and Accardo's reputations, the relevance of its objections to the evidence underlying those findings is not apparent.[5]

[5] We note, however, that the Director expressly disclaimed reliance on the reversed conviction (R. 497), and that the newspaper publicity given to Accardo's reputation as a racketeer had a peculiar relevance here because the very fact of publicity would add to the coercive influence that Accardo's association with Premium would have upon prospective customers. See R. 491.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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Internal Revenue Service.

NOVEMBER 1963.

APPENDIX

Sections 3(c), 4(a), and 5(a) of the Federal Alcohol Administration Act, 49 Stat. 977 (as amended, 27 U.S.C. 201 *et seq.*) provide in part as follows:

SEC. 3. In order effectively to regulate interstate and foreign commerce in distilled spirits, wine, and malt beverages, to enforce the twenty-first amendment, and to protect the revenue and enforce the postal laws with respect to distilled spirits, wine, and malt beverages:

* * * * *

(c) It shall be unlawful, except pursuant to a basic permit issued under this chapter by the Secretary of the Treasury—

(1) to engage in the business of purchasing for resale at wholesale distilled spirits, wine, or malt beverages; or

(2) for any person so engaged to receive or to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, wine, or malt beverages so purchased.

* * * * *

SEC. 4. (a) The following persons shall, on application therefor, be entitled to a basic permit:

* * * * *

(2) Any other person unless the Secretary of the Treasury finds (A) that such person (or in case of a corporation, any of its officers, directors, or principal stockholders) has, within five years prior to the date of application, been convicted of a felony under Federal or State law

or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor, including the taxation thereof; or (B) that such person is, by reason of his business experience, financial standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted.

* * * * * *

SEC. 5. It shall be unlawful for any person engaged in business as * * * an importer or wholesaler, of distilled spirits, wine, or malt beverages, * * * directly or indirectly or through an affiliate:

(a) *Exclusive outlet.*—To require, by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engaged in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce; or * * *.

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No. 429

SEAWAY BEVERAGES, INC.,
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C. DOUGLAS DILLON, SECRETARY OF THE TREASURY OF THE UNITED STATES, DWIGHT E. AVIS, DIRECTOR OF ALCOHOL AND TOBACCO TAX DIVISION OF INTERNAL REVENUE SERVICE, AND THE UNITED STATES OF AMERICA,
Respondents.

REPLY OF PETITIONER TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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ANDREW J. DELANEY,
ROBERT A. SPRECHER,
MICHAEL A. BILANDIC,
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THE GUTHROP-WARREN PRINTING COMPANY, CHICAGO

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Respondents.

REPLY OF PETITIONER TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This reply is limited to what the petitioner deems to be important errors in the respondents' brief:

1. Respondents state that "the denial of the permits was based entirely on Volpe's relationships . . . with Cerone and Accardo" (page 4) and the statement on pages 2 through 6 discusses Volpe's dealings with Cerone, whereas the Director of the Alcohol and Tobacco Tax Division expressly held in his order that "I do not feel that these factors alone [in regard to Cerone] are of sufficient consequence to support a denial of these applications" (JA 492).

2. Respondents state that "this case does not involve the denial of a permit on the basis of an applicant's mere 'associations'" (page 9), whereas the specified ground for the denial of the permits (JA 40-42; respondents' brief, page 3) and the decision of the hearing examiner was based entirely upon the "association" of Volpe with Accardo (JA 453-4). Respondents in their brief admit that the denial of the permits was based entirely on Volpe's associations (pages 4-6).

3. Respondents state that "the decision of the Director turned, not upon Volpe's associations at large, but upon the direct participation in the hiring of a person with a reputation as a notorious racketeer to be a 'salesman' of alcoholic beverages" (page 9), whereas the Hearing Examiner expressly found that (JA 451):

> "There is no evidence that Volpe had ever done any business with Accardo prior to Accardo's employment by Premium. *The negotiations leading up to this employment were initiated by Feicht.* . . ."

4. The respondents state at page 10 that "from Volpe's demonstrated willingness to participate in bringing reputed racketeers into the alcoholic beverage industry when his job depended upon it, it was reasonable, we submit, for the Director *to draw the inference* that Volpe would be likely to pursue a similar course in the future if the financial success of his new corporation should depend upon it. . . ." It is impossible for the Director to draw such an inference in view of the express findings of the Hearing Examiner, which were affirmed by the Director as follows (JA 451-2):

> "34. No evidence was adduced that any person of ill repute is a shareholder, officer, director, employee or agent, of, or associated or connected in any way with the applicant. . . .

"35. *Volpe testified that he would not hire any person of ill repute, even if it were to his economic advantage to do so.* . . .

"36. Volpe has never been arrested or convicted of any crimes of any kind, nature or description. . . .

"37. Volpe testified that he is not and has never been a member of any syndicate or ring of hoodlums, that he is not a front for any such syndicate or ring or any other person and that *no person other than those set out in the application would have any interest in the business for which he seeks a permit and no contrary evidence is adduced.* . . .

"38. Evidence shows that Volpe has a good general reputation as attested by some fifteen witnesses.

"39. *Several witnesses testified without contradiction that they were familiar with the permit system of the liquor industry and that in their opinion Volpe would act in conformity with the Federal laws and that he is a decent law abiding citizen.*".

If the administrative agency is permitted by the statute to make inferences and reach conclusions directly contrary to its findings, then the statute clearly does not establish constitutional standards.

5. Respondents' only answer to the petitioner's argument that the statutory standard is so vague as to be unconstitutional as a delegation of legislative power is the citation of *Ma-King Products Co.* v. *Blair*, 271 U. S. 479 (1926). In that case, the applicant sought a permit under the National Prohibition Act to operate a plant for denaturing alcohol. The principal officers of the corporate applicant had been involved with business associates who were violators of the prohibition laws.

The *Ma-King* case did not pass upon the constitutionality of the Prohibition Act, but even if it had, the Prohibition Act is clearly distinguishable from the Federal Alcohol Administration Act. This Court said in that case at page 482 that the National Prohibition Act "does not provide

that the Commissioner *shall* issue any legal permit, but merely that he *may* do so."

Not only has no associate of the petitioner in this case nor of Volpe ever been convicted of violation of the Federal Alcohol Administration Act or of any crime or violation of law, but that Act provides that an applicant "*shall . . . be entitled to a basic permit*" unless the Secretary of the Treasury finds certain conditions to exist, one of which is that the applicant is "not likely" to maintain operations in conformity with federal law, which condition has been attacked by the petitioner herein as unconstitutional. As stated by the petitioner in its petition, the validity of this provision of the Federal Alcohol Administration Act has never been tested in the courts.

6. Respondents contend that the introduction of Accardo's income tax returns, of his (later reversed) conviction and of newspaper clippings describing him "were only cumulative evidence" (pages 11-12). Respondents failed to meet petitioner's point that this evidence was prejudicial and caused the denial of the permits, as shown by the erroneous treatment of this evidence by the Court of Appeals, which error has not been commented on by the respondents.

Conclusion.

For the foregoing reasons and those set forth in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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ROBERT A. SPRECHER,
MICHAEL A. BILANDIC,
JOSEPH B. DANZANSKY,
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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Seaway Beverages, Inc. prays that this Court grant rehearing of its order of November 18, 1963, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia in the above-entitled case as prayed for in the petition filed September 3, 1963, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. Mr. Justice Douglas was of the opinion that certiorari should be granted, and the Honorable Chief Justice Warren on November 20, 1963, stayed the issuance of the order denying the petition for certiorari pending the timely filing and disposition of a petition for rehearing.

2. On December 2, 1963, in his dissenting opinion, concurred in by Mr. Justice Douglas, in No. 275, *Chicago & Eastern Illinois Railroad Co. v. United States*, 32 U. S. Law Week 3202-3204, Mr. Justice Black complained strongly that he was unable to determine from the Interstate Commerce Commission's report in that case whether its ultimate conclusion was supported by substantial evidence, urged that such reports be understandable enough so that administrative actions may be reviewed, and concluded at page 3204:

> "The Commission apparently seeks to make a rubber stamp of any court reviewing its orders. I do not like that role."

Despite the fact that the hearing examiner in the present case made, the Assistant Regional Commissioner adopted, and the Director of the Alcohol and Tobacco Tax Division of Internal Revenue affirmed, findings (Findings 32 through 39, JA 451-2, set out in the petition for certiorari at pages 15-16 and the reply of the petitioner at pages 2-3) which make it utterly impossible to reach the ultimate finding and conclusion denying the permits, nevertheless the Court of Appeals concluded that "we perceive no basis for disturbing these findings and conclusions." The history of the Federal Alcohol Administration Act is one of continuous rubber-stamping by the courts of administrative actions under what is undeniably the broadest discretion ever conferred upon an administrative agency—the determination of what an applicant is "likely" to do. It is virtually impossible to find any judicial disturbance of an order under the Act, despite the fact that the Director controls the economic life and death of the members of a multi-billion dollar industry, despite the incongruity of the act which permits a felon to obtain a permit after 5 years but an "unlikely" person to be barred from a permit forever, and despite the important and abiding constitu-

tional questions which, in the present case, have been determined by the rubber-stamping of a finding of guilt by association. The administration of the Act in this case and throughout its history has been as Justice Prettyman in *Armour & Company* v. *Freeman*, 304 F. 2d 404 (C. A., D. C., 1962) at 411, said of another agency, "bureaucratic absolutism run wild."

Professor Davis has set forth seven situations which call for the "substitution of judicial for administrative judgment" and this case fits almost every category (4 Davis, Administrative Law, 1958, § 30.07, pages 232-3):

> ". . . Substitution of judicial for administrative judgment is often rather clearly desirable, especially when the statutory purpose is unclear, in many large categories of cases, including those involving problems which (1) transcend the single field of the particular agency, (2) call for interpretation of the common law, (3) are primarily problems of ethics or fairness of a common-law type, (4) are affected substantially by constitutional considerations, whether or not a constitutional issue is directly presented, (5) require analysis of legislative history, especially when political conflict is the essence and not legislative inquiry into technical understanding within the agency's field of specialization, (6) bring into question judge-made law previously developed in the course of statutory interpretation, and (7) impel the reviewing court to make a discretionary choice for any reason, explained or unexplained, to create or mold law as a guide for the agency and for affected parties."

3. The opinion of the Court of Appeals in the present case should not be permitted to stand "as a guide for the agency and for affected parties." The petitioner has set forth in detail (petition for certiorari pages 31-2) the completely erroneous portion of the opinion which was left uncorrected by the Court of Appeals although pointed

out in the petition for rehearing in that court. The government in its brief in opposition to the petition for certiorari did not attempt to justify or answer this gross error which remains in the opinion. Furthermore, the opinion did not speak to or rule upon the substantial issues raised, nor did it furnish any clarification of, legal analysis of, or judicial concepts in connection with, the provisions of the Federal Alcohol Administration Act. Now only this Court can erase that opinion and give rule and reason to an agency and affected parties so that all may exist under government by law rather than under unguided conclusions of man.

One of the landmark cases in the law, *Hickman* v. *Taylor*, 329 U. S. 495 would not exist if this Court did not on occasion review its denial of petitions for certiorari (327 U. S. 808, 328 U. S. 876). This case merits the review of this Court as Mr. Justice Douglas has hertofore noted.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the District of Columbia.

Respectfully submitted.

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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